Message Text

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AN OBJECTION OF THIS KIND, PUT FORWARD FOR MANY YEARS NOW BY CERTAIN JURISTS WHO THEREBY AMAZINGLY OVERLOOK THE TRANS-FORMATIONS AND IMPERATIVES OF OUR TIME, NO LESS THAN THE ELEMTARY PROCESS OF THE FORMATION OF NORMS OF CUSTOMARY LAW, WOULD HAVE PARADOXICAL EFFECT OF ADMITTING AND ASCRIBING LAW-MAKING EFFECTS TO THE MERE NEGATIVE ATTITUDE OF ANY STATE WHICH HAPPENED TO REFUSE THE IMPLEMENTATION F A RULE EXPRESSING THE GENERAL CONSENSUS OF AN INTERNATIONAL COMMUNITY IN CONSTANT EVOLUTION. THE PRINCIPLE OF SELF-DETERMINATION, A POLITICAL AND LEGAL DYNAMIC WHICH HAS GRADUALLYRIPENED IN THE FOLDS OF THE UNIVERSAL CONSCIENCE OF MANKIND, FINDS DAILY CONFIRMATION, THIS BEING A SIGN OF THE PERMANENT CONSENSUS OF INTERNATIONAL SOCIETY, IN AN IMPRESSIVE SERIES OF MULTILATERAL AND BILATERAL GOVERNMENTAL DECLARATIONS.
THE MERELY DECLARATORY CHARACTER OF RESULTUTION 1514 (XV), WHICH WAS UNANIMOUSLY ADOPTED BY THE GENERAL ASSEMBLY, ADDS TO ITS IMPERATIVE FORCE, FOR ITS IS CONFINED TO THE LEGAL CONSECRATION OF A STATE OF AFFAIRS WHICH HAD BEEN GRADUALLY REACHED THROUGH LENGTHY PRACTICE, A SUSTAINED ACT OF MORAL AWARENESS AND AN UN-EQUIVOCAL CONSENSUS OF THE INTERNATIONAL COMMUNITY. THIS DECLARATION CONFERRED FULL SCOPE AND MEANING ON A PRINCIPLE WHICH HAD ALREADY BEEN PROCLAIMED IN AN INSTITUTIONAL TREATY, NAMELY THE CHARTER OF THE UNITED NATIONS. IT THUS CONSTITUTES A STAGE IN THE TRANSFORMATION PROCESS OF BINDING NORMS IN THAT IT CONSECRATES, BY THE CONCORDANT WILL OF THE MEMBER
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STATES, A CUSTOMARY RULE IN COURSE OF FORMATION.
AT ALL EVENTS, THE STERILE AND DERISORY DISCUSSIONS ABOUT THE LEGAL VALUE AND IMPERATIVE CHARACTER OF THE 1960 DECLARATION AND OTHER GENERAL ASSEMBLY RESOLUTIONS ON THE RIGHT TO SELF-DETER-

MINATION MUST CEASE. THOUGH WE KNOW PERFECTLY WELL THAT THE
UNITED NATIONS IS NEITHER A UNIVERSAL LAW-MAKING ORGAN NOR
A SUPER-STATE, IT IS IMPOSSIBLE TO BE UNAWARE THAT WHEN, IN
THE PROCESS OF THE FORMATION OF NEW RULES OF INTERNATIONAL LAW,
A PRINCIPLE WHICH IS BEING FORMED IS DECANTED INTO
A RESOLUTION WHICH IS ADOPTED UNANIMOUSLY AND WITHOUT ANY LEGALLY
VALID OBJECTION,THAT RULE IS POISED FOR FINAL CONSECRATION.
ONE COULD GO FURTHER. THOSE WHO SEE THE RIGHT OF PEOPLES TO
SELF-DETERMINATION AS MERELY A MORAL PRINCIPLE DEVOID OF LEGAL
SIGNIFICANCE BACK UP THEIR ARGUMENTS BY POINTING TO THE CON-
TRAST BETWEEN POSITIVE LAW, WHICH ALONE SHOULD BE APPLIED, AND
NATURAL LAW, WHICH SHOULD BE LEFT TO THE INCORRIGIBLE DREAMERS.
BUT WHO CAN FAIL TO SEE THAT IF, IN THESE MUFFLED BATTLES BETWEEN
PSOTIVE LAW AND NATURAL LAW, CREON HAS SO FAR TRIUMPHED OVER
ANTIGONE, THIS IS BECAUSE POSITIVE LAW WAS HAND IN GLOVE WITH
IMPERIALISM AND COLONIALISM OR, MORE PRECISELY, WAS AN
EXPRESSION OF THESE ONCE DOMINANT PHENOMENA? TODAY THE DECLINE
OF THESE PHENOMENA, CONDEMNED AS INTRINSICALLY ILLEGAL BY THE
GENERAL ASSEMBLY, EXPRESSES A NEW REALITY, THAT OF THE TRIUMPH
OF ANTIGONE OVER CREON AND THAT OF THE BIRTH OF A NEW POSITIVE
LAW. THIS IS SOMETHING WHICH RENE-JEAN DUPUY, IN A PAPER
CONTRIBUTED TO THE TOULOUSE COLLOQUIUM OF THE FRENCH INTERNA-
TIONAL LAW SOCIETY ("DROIT DECLARATOIRE ET DROIT PROGRAMMATOIRE:
DE LA COUTUME A LA 'SOFT-LAW.", L'ELABORATION DU DROIT INTERNATIONAL
PUBLIC, PARIS, PEDONE, 1975, PP 132-148), HAS STRESSED TO
PERFECTION.
ONE OUGHT TO GO STILL FURTHER. THE RIGHT TO SELF-DETERMINATION
COULD BE SAID TO HAVE BECOME THE ESSENTIAL PRINCIPLE OF INTERNA-
TIONAL SOCIETY. THIS SOCIETY HAS UNDERGONE GIGANTIC MUTATIONS IN
THE SPACE OF A FEW DECADES. WHAT USED TO BE THE CLOSED CLUB
OF STATES HAS GRADUALLY ENLARGED TO THE POINT WHERE INTERNATIONAL
SOCIETY HAS BECOME OPEN AND HAS UNDERGONE A QUALITATIVE MODIFICATION.
BUT THIS ENLARGEMENT COULD ONLY BE ACHIEVED BECAUSE THE RIGHT
TO SELF-DETERMINATION ENABLED NEW STATES TO EMERGE ONTO THE
INTERNATIONAL STATE. IN OTHER WORDS, THE RIGHT OF PEOPLES
TO SELF-DETERMINATION HAS BEEN THE INSTRUMENT, THE KEY AND THE
TOOL OF AN OPEN AND OECUMENICAL SOCIETY, A UNIVERSAL SOCIETY.
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IT HAD BEEN A PREREQUISITE FOR THE EXISTENCE OF THIS NEW INTER-
NATIONAL COMMUNITY. IT HAD BECOME ITS PRIMARY PRECONDITION,
FOR IT WAS THAT RIGHT WHICH ENABLED INTERNATIONAL SOCIETY TO
BE WHAT IT IS. THAT BEING SO, THIS PRINCIPLE CANNOT BE
ESSENTIAL, BY WHICH I MEAN THAT IT GOVERNS THE VERY ESSENCE OF THE
NEW SOCIETY. IF THERE IS NO SELF-DETERMINATION, THERE IS NO
SOCIETY OF THE KIND WE HAVE NOW. YOU CAN SEE WHERE THE DETRACTORS
OF THE RIGHT TO SELF-DETERMINATION ARE IN DANGER OF BEING
LED BY THEIR DENIAL OF ITS LEGAL VALUE: TO THE DENIAL, QUITE
SIMPLY, OF PRESENT-DAY INTERNATIONAL SOCIETY.
THE RIGHT TO SELF-DETERMINATION IS THUS, WITHIN THE HIERARCHY OF
NORMS, AN ESSENTIAL AND PRIMARY LEGAL PRINCIPLE FROM WHICH THE
OTHER PRINCIPLES GOVERNING THE INTERNATIONAL COMMUNITY FLOW.

TO DISREGARD THIS REALITY IS TO FAIL TO SEE THE WOOD FOR THE TREES.
THIS RIGHT THEREFORE BELONGS TO JUS COGENS, SO MUCH SO THAT THE
INDIVIDUAL STATE IS NOT SIMPLY LEFT THE OPTION OF IMPLEMENTING
IT, AND THAT THE UNITED NATIONS IS EXERCISING EVER STRICTER
SUPERVISION OVER THE COMPLIANCE WHICH IS IMPERATIVELY REQUIRED
OF THE ADMINISTERING POWER. I NOW COME TO THIS IN THE FRAMEWORK
OF CONSIDERING THE CRITERIA OF SUPERVISION.
THE WORLD HAS LEARNED ITS LESSON. IN THE PAST, THE TERRA
NULLIUS THEORY DID NOT COMPRISE ANY CRITERION ALLOWING AN ORGAN
EXTERNAL TO THE OCCUPYING STATE TO VERIFY WHETHER THE TERRITORY
TAKING ITS INTERNAL POLITICAL AND SOCIAL SITUATION INTO ACCOUNT,
WAS REALLY A TERRITORY BELONGING TO NO-ONE SUCH AS MIGHT BE
OCCUPIED. THE COLONIZING STATE ENJOYED AN AUTHORITY WHICH WAS
LIMITED SOLELY BY THAT OF ANY OTHER RIVAL COLONIZING STATE.
THE OPPOSITE NATURE OF THE RESPECTIVE FUNCTIONS FULFILLED BY
THE TERRA NULLIUS THEORY AND THE RIGHT TO SELF-DETERMINATION IS
ALSO APPARENT AS CONCERNS THE PROBLEM OF SUPERVISION. THE COLONIAL
STATE IS NOW NO LONGER FREE, AS IT WAS IN THE PAST, TO CHOOSE
THE MOMENT FOR GRANTING INDEPENDENCE AND PUT OFF ITS ARRIVAL
TO SUIT ITSELF. THE COLONIAL PHENOMENON FORMERLY AUTHORIZED
HAS TODAY BEEN DECLARED ILLEGAL, SO THAT IF THE COLONIAL STATE
USED TO BE THE SOLE JUDGE OF WHETHER A TERRITORY COULD BE OCCUPIED
ON ACCOUNT OF AN ALLEGED STATE-POWER VACUUM, IT IS NOT NOW
ALLOWED TO BE SOLE JUDGE OF THE MOMENT WHEN IT SHOULD GRANT
INDEPENDENCE.
RESOLUTION 1514 (XV) PROCLAIMS THE IMMEDIATE RIGHT OF COLONIAL
PEOPLES TO INDEPENDENCE, AND DECLARES THAT THE ALLEGED IN-
ADEQUACY OF POLITICAL PREPAREDNESS SHOULD NEVER SERVE AS A PRETEXT
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FOR DELAYING INDEPENDENCE.
THROUGH A SERIES OF MECHANISMS WHICH NEED NOT BE DETAILED HERE,
THE UNITED NATIONS POSSESSES A RIGHT OF SUPERVISION OVER THE
INCEPTION AND CULMINATION OF THE PROCESS OF SELF-DETERMINATION.
THE COLONIAL STATE DOES NOT, AS IN THE 19TH CENTURY, POSSESS
EXCLUSIVE COMPETENCE IN RESPECT OF THE OCCUPIED TERRITORY. THE
CONCLUSION WHICH THE GENERAL ASSEMBLY REACHED AT A VERY EARLY
STAGE TO THE EFFECT THAT ARTICLE 2, PARAGRAPH 7, OF THE CHARTER,
RELATING TO DOMESTIC JURISDICTION, WAS NOT APPLICABLE TO COLONIES,
WAS ONE OF THE EARLIEST DEMONSTRATIONS OF THIS RIGHT OF SUPERVISION
VESTED IN THE INERNATIONAL COMMUNITY.
IT MUST HOWEVER BE ADMITTED THAT THE MECHANISMS FOR THE
IMPLEMENTATION AND SUPERVISION OF THE APPLICATION OF THE SELF-
DETERMINATION PRINCIPLE, AS PROVIDED FOR IN RESOLUTION 1514 (XV),
REMAINED SOMEWHAT ROUGH AND READY. UNFORTUNATELY, THEY AFFORDED
REFRACTORY GOVERNMENTS MANY OPPORTUNITIES OF EVADING THEIR
INTERNATIONAL OBLIGATIONS.

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